Filed 4/1/09 Handley v. Super. Ct. Ca2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WAYNE S. HANDLEY et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; BUFFALO PUMPS, INC., et al., Real Parties in Interest.	B214717 (Los Angeles County Super. Ct. No. BC388972)

ORIGINAL PROCEEDINGS in mandate. William Fahey, Judge. Petition granted.

Waters Kraus & Paul, Paul C. Cook and Michael B. Gurien for Petitioners.

No appearance for Respondent.

Jackson & Wallace, John R. Wallace, Todd M. Thacker and Christine A. Huntoon for Real Party in Interest Buffalo Pumps, Inc.

Gordon & Rees, Michael Pietrykowski, Don Willenburg and T. Stephen Corcoran for Real Party in Interest Leslie Controls, Inc.

Becherer Kannett & Schweitzer, Angus M. MacLeod for Real Party in Interest M. Slayen and Associates, Inc.

Hassard Bonnington, Philip S. Ward for Real Party in Interest John Crane Inc.

K&L Gates, Stephen P. Farkas for Real Party in Interest Crane Co.

Walsworth, Franklin, Bevins & McCall, Thomas G. Scully, Sean P. Martin and Tamara M. Trulin for Real Party in Interest Elliott Company.

Hawkins, Parnell & Thackston, Robert E. Thackston and Julia A. Gowin for Real Party in Interest Warren Pumps.

This case involves the standard for the setting of trial preference for a 65-year-old plaintiff with a terminal illness and a life expectancy estimated by his treating physician as no more than three months. Under the circumstances of this case we conclude both the statutorily mandated time set forth in subdivision (f) of section 36 of the Code of Civil Procedure[1] and the interests of justice entitle plaintiff to a preferential and immediate trial date in order to protect his right to be present at trial.[2]

DISCUSSION

1. *Procedural background.*

On August 18, 2008, the trial court granted a motion for trial preference (§ 36, subd. (f)) and set a trial date of February 2, 2009.

Following the trial court's decision on motions for summary adjudication, plaintiff Wayne Handley ("plaintiff"), on January 29, 2009, filed a petition for writ of mandate. The following day, after reviewing the petition, we issued a notice of intent to grant a peremptory writ of mandate in the first instance (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171), and set an expedited briefing schedule.

---

[1] Statutory references are to the Code of Civil Procedure.

[2] In pertinent part, subdivision (f) of section 36 specifies that a plaintiff who is entitled to trial preference is entitled to trial within 120 days and "Any continuance shall be for no more than 15 days[.]"

On February 11, 2009, 13 days after the petition was filed, we filed the opinion, granting the petition for writ of mandate and lifting the stay with the following statement: "In view of the exigent circumstances of this case and the precarious nature of petitioners' health, we conclude immediate finality of this decision is necessary to prevent frustration of the relief granted and to promote the interests of justice. Accordingly, the decision is final as to this court when filed. (Cal. Rules of Court, rule 8.264(b)(3).)" (*Handley v. Superior Court* (Feb. 11, 2009, B213626 [nonpub. opn.] at p. 4.)

The matter should have immediately been restored to the trial preference calendar after the stay was lifted. (§ 36, subd. (f); *Sprowl v. Superior Court* (1990) 219 Cal.App.3d 777, 781-782.) When it was not, plaintiff, on February 17, 2009, filed an ex parte motion seeking an order restoring the case to the court's trial preference docket. The ex parte motion was accompanied by a declaration from plaintiff's physician concerning the state of plaintiff's health.

The trial court set a trial setting conference date of March 6, 2009, directing all parties to file memoranda addressing the new trial date. Several defendants filed opposition to the setting of a preferred trial date, citing busy schedules and vacation plans. After the conference, the court set a trial date of July 21, 2009, 137 days after the trial setting conference and almost a full year after the initial order granting trial preference.

Plaintiff filed a petition for writ of mandate, seeking an order setting an earlier trial date, citing subdivision (f) of section 36 which specifies a continuance of a preferential trial date *shall* not be more than 15 days. He requests a directive to the trial court to set a trial date within 15 days of the day the writ is issued and, if Judge Fahey is not available at an earlier day, to direct that, in the interest of justice, the case be assigned to another department so that the trial can proceed as soon as is feasible.

After reviewing the petition, we notified the parties and the trial court we were considering issuance of a peremptory writ of mandate in the first instance and set an

expedited briefing schedule. (*Lewis v. Superior Court, supra,* 19 Cal.4th 1232; *Palma v. U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d 171.)

2. *Factual circumstances.*

Handley has malignant pleural mesothelioma, a terminal cancer caused by exposure to asbestos. In support of the application to restore the case to the preference docket, Handley's counsel argued the odds of plaintiff surviving until the delayed trial date was minimal and further delays would deprive him of his right to be present during trial and to obtain his full measure of damages.

Carl F. Myers, plaintiff's treating physician provided a declaration, dated February 27, 2009, setting forth plaintiff's continuing deteriorating health and stating that plaintiff's cancer was rapidly progressing. The physician further described the risk of potentially-fatal opportunistic infection arising from complications of chemotherapy. Dr. Myers stated plaintiff has cardiomyopathy which presents the possibility of mortality from pulmonary embolic disease. The physician expressed the view that within reasonable medical certainty ". . . there is substantial medical doubt of his survival beyond the next three (3) months. Additionally, if he does not have a court date well before that date, it is probable that he will not be able to meaningfully participate in his own case and, more importantly, very likely that he will not be alive for his chance to have his case heard by a jury. The more that we delay his trial date, the less likely he will be able to meaningfully participate in his trial."

In opposition to the setting of a preferred trial date, defendants' counsel described "very busy counsel and experts," and requested more time to prepare. Even though counsel for defendants should have been prepared for trial no later than February 2, 2009, they each described "multiple commitments" and vacation schedules hindering their readiness for trial.

Inconvenience to counsel is *not* a valid basis for a delay of trial where the plaintiff is entitled to trial preference under section 36. It is well established that when a plaintiff is entitled to trial preference "Mere inconvenience to the court or to other litigants is irrelevant. . . . The trial court has no power to balance the differing interests of opposing

litigants in applying the provision." (*Miller v. Superior Court* (1990) 221 Cal.App.3d 1200, 1205.)

In denying the motion for returning the case to the trial preference calendar, the trial court commented "Well, it's too bad we didn't have that February 2 date, but because of the tactical decisions of plaintiffs' counsel, you lost the date[.]" We are unaware of any legal basis for such a penalty imposed against a party who files a successful petition for writ of mandate. The filing of a petition for writ of mandate does not, under any circumstances, operate as a waiver of the substantive rights given to plaintiff by the Legislature and cannot be deemed a basis for an order that is in violation of the mandatory 15-day time limit for trial continuance established in subdivision (f) of section 36.

3. *Section 36.*

Subdivision (d) of section 36 provides: "In its discretion, the court may also grant a motion for preference that is accompanied by clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and that satisfies the court that the interests of justice will be served by granting the preference."

Unlike subdivision (a) of section 36, no age limit is required for trial preference on a motion made under subdivision (d) of section 36.[3] The declaration of plaintiff's treating physician establishes substantial doubt that plaintiff will survive until the delayed trial date of July 21, 2009, a date that far exceeds the 15 day limit on continuances of trial for a plaintiff entitled to trial preference. Subdivision (f) of section 36 specifies that "Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance

---

[3] The order issued by this court on January 29, 2009, inadvertently included a reference to subdivision (a) of section 36 which is applicable to litigants over the age of 70.

shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party."

Defendants resort to the specious contention that the limitation on trial continuances contained in subdivision (f) of section 36 applies only to subdivision (a) and not to subdivision (d).

Where, as here, the statutory language is clear and unambiguous, there should be no need for judicial construction. (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340.) Nonetheless, in view of defendants' contention, we set forth a brief review of the principles of statutory construction.

"The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) The purpose of judicial construction of a statute is to determine the meaning that comports most closely with the intent of the Legislature " 'with the view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461, 468.) The statute must be read " ' "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." ' [Citation.]" (*Ibid*.)

The court must look to the language of the statute, giving each word its usual and ordinary meaning. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 90.) " 'A statute must be construed "in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts." [Citation.]' [Citation.]" (*People v. Hull* (1991) 1 Cal. 4th 266, 272, applying the statutory time limit in section 170.3 to section 170.6.)

The legislative purpose of a statute is determined " 'by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated or vindicated, the social history which attends it, and the effect of the particular language on the entire statutory

scheme. [Citations.]' " (*McLaughlin v. State Bd. Of Education* (1999) 75 Cal.App.4th 196, 223.)

The provisions of the statue must be interpreted to effectuate the legislative intent. The interpretation of section 36 advocated by defendants is repugnant to the purpose of the statute. According to defendants' interpretation of the statutory scheme, a person who suffers from an illness raising medical doubt as to his survival beyond six months is not entitled to the same protections afforded to persons under other sections of the same statute. The argument that the limitation on continuances set forth in one section of section 36 does not apply to each and every section of the statute leads to an absurd result that could not have been the legislative intent.

In order to achieve harmony among the subdivisions of section 36, the limitations on continuances for a terminally ill litigant (§ 36, subd. (d)) must be exactly the same as for a person who is granted trial preference under any other subdivision of section 36. Accordingly, we conclude the 15-day limitation on continuances set forth in subdivision (f) of section 36 is applicable to a litigant eligible for trial preference pursuant to subdivision (d).

4. *Preservation of right to be present at trial.*

In *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, the court observed that damages for pain, suffering, and disfigurement do not survive a plaintiff's death and explained that the Legislature intended to protect a substantive right to such damages for litigants whose health is such that delays will result in prejudicing that party's interests. (*Id*. at pp. 88-91.) Even though *Rice* was brought by a person over the age of 70, every case subsequent to *Rice* has followed the rationale. (See, e.g., *Koch-Ash v. Superior Court* (1986) 180 Cal.App.3d 689, section 36 prevails over the interest of judicial economy in avoidance of repetitive litigation; *Vinokur v. Superior Court* (1988) 198 Cal.App.3d 500, section 36 prevails over the statutory scheme for compulsory arbitration); *Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085-1086, failure to complete discovery or other pretrial matters does not affect the substantive right to trial preference in section 36.)

Here, the trial court made an unfortunate comment that plaintiff's testimony could be preserved by video. If this comment is predicated on the probability that plaintiff may not survive until the delayed trial date set by the court, it embodies a viewpoint that is directly contrary to the legislative intent in enacting section 36 to protect litigants such as plaintiff. Section 36 grants a mandatory and absolute right to trial preference for any litigant who meets the criteria set forth therein. The clear intent of the Legislature is to safeguard litigants who qualify under section 36 against the acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and to obtain appropriate recovery. (*Miller v. Superior Court, supra,* 221 Cal.App.3d at p. 1205.)

5. *Other pending case.*

Defendants argue they want to bring new summary adjudication motions citing a recent Court of Appeal case (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564) as having a possible impact on some of the issues in this case. The unknown impact of a newly published, not yet final, case on *some* of plaintiff's claims does not eliminate his right to trial preference.[4]

The issue was addressed in *Koch-Ash v. Superior Court, supra,* 180 Cal.App.3d 689, which held it is an abuse of discretion to continue trial of a plaintiff who has been granted preference even though a pending appeal of a related case would likely be dispositive of the plaintiff's claims. The trial court's ruling in *Koch-Ash* was based on striking a balance between the rights of a plaintiff entitled to trial preference and the interest of the court in avoiding a potentially unnecessary trial. *Koch-Ash* held, in view of the mandatory preference set forth in section 36, the trial court has no right to balance interests, including whether an unrelated case may have some impact on the litigation where the unresolved matter will delay the trial of a person entitled to section 36 preference. (*Kosh-Ash, supra,* at pp. 696-697.)

---

[4] *Taylor v. Elliott Turbomachinery Co., Inc., supra,* 171 Cal.App.4th 564 was filed February 25, 2009 and is not final. Awaiting the finality of *Taylor* undoubtedly would eliminate plaintiff's right to be present at trial.

6. *No motion for reconsideration.*

Counsel for defendants attempts to characterize the lengthy delay of trial as a sua sponte decision of the trial court to reconsider its August 18, 2008, order granting trial preference. There is nothing in the record supporting this out-of-left field contention. Indeed if the trial court had done so, and even deeming the trial court's order as one showing reconsideration of plaintiff's right to trial, such a procedure would have been a clear abuse of its discretion. The record indisputably entitles plaintiff to a trial at the earliest possible time and without further delay.

7. *Convenience of counsel.*

Counsel for defendants seeks to apply the general considerations used for establishing a trial date set forth in California Rules of Court, rule 3.729, without specifying which factor, if any, should prevail over plaintiff's right to be present for trial. In order to comply with the constitutional mandate of consistency with statutory law, it is well settled that a rule of court must not conflict with the statutory intent. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 655.)

Defendants' argument, predominantly, is based on claims of inconvenience to counsel citing busy trial schedules and vacation plans. In addressing similar arguments in a case in which the plaintiff had been granted trial preference pursuant to subdivision (a) of section 36, *Vinokur v. Superior Court, supra*, 198 Cal.App.3d 500, held the busy trial schedule of counsel is irrelevant and cannot be balanced against plaintiff's right to trial preference. ". . . [S]ection 36, which is 'mandatory and absolute in its application,' is unquestionably the controlling authority[.]" (*Id.* at p. 503.)

Obviously, vacation plans and busy schedules of counsel do not constitute good cause for continuance beyond the statutorily mandated maximum time period established in section 36.

8. *Availability of trial department.*

Sprowl v. Superior Court, supra, 219 Cal.App.3d 777, addressed the argument that a trial court may postpone a trial when no courtrooms are available (§ 594). *Sprowl* concluded that absent a finding that *all* trial departments are engaged in trials of criminal cases, cases facing dismissal, or civil cases with trial preferences ahead of the plaintiff, the court must set a trial date in compliance with section 36. The mandatory nature of section 36 leaves no discretion to the courts. (*Sprowl v. Superior Court, supra,* at p. 781.)

In addressing similar arguments in a case in which the plaintiff had been granted trial preference pursuant to subdivision (a) of section 36, *Miller v. Superior Court, supra,* 221 Cal.App.3d 1200 held the statutory scheme does not violate the power of trial courts to regulate the order of their business. " 'Mere inconvenience to the court or to other litigants is irrelevant. . . . The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations. [Citation.]' " (*Id*. at p. 1205.)

"If trial courts are permitted to make administrative inroads into the section 36 mandate, the effective of that mandate will be eviscerated, if only to the extent that a litigant's section 36 rights will be jeopardized while appellate courts review circumstances seen by trial courts as justifying their revocation of trial preferences upon their own re-balancing of interests." (*Koch-Ash v. Superior Court, supra*, 180 Cal.App.3d at pp. 698-699.) Our Supreme Court long ago stated it is "monstrous" to foreclose a litigant's substantive rights simply because the procedure of the court is too slow. (*Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 349, citing *Weeks v. Roberts* (1968) 68 Cal.2d 802, 807.)[5]

---

[5] Defendants' counsel cited *Salas v. Sears, Roebuck & Co., supra,* 42 Cal.3d 342, for the proposition that a trial court does not have a mandatory duty to set a preferential trail date but fail to mention the fact that *Salas* is discussing the *discretionary* setting of a trial date to avoid dismissal for lack of diligence, not the *mandatory* provisions of section 36.

This is exactly what happened here. Based on the medical evidence establishing plaintiff's deteriorating health and limited life expectancy, plaintiff's substantive right to a trial during his lifetime ultimately would be eliminated by the lengthy delay contemplated in the trial court's order. In view of the previously scheduled trial date of February 2, 2009, there is no evidence whatsoever contained in the record that the trial cannot proceed immediately. Furthermore, there is no indication that no trial department is available to try this case.

CONCLUSION

The trial date of July 21, 2009 is a clear violation of the mandatory and specific statutory requirements of subdivision (f) of section 36 which specifies a continuance of a preferential trial date *shall* not be more than 15 days.

We have reached this decision after notice to all parties that we might act to issue a peremptory writ of mandate in the first instance and after receiving and considering opposition from counsel for defendants. (*Lewis v. Superior Court, supra*, 19 Cal.4th 1232; *Palma v. U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d 171),

We conclude both the statutorily mandated time set forth in subdivision (f) of section 36 and in the plain interests of justice require that plaintiff is entitled to an immediate trial date in order to protect his right to be present at trial.

DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to set a trial date in conformity with the statutory requirements of section 36, and, in no case, more than 15 days from finality of this decision. (*Sprowl v. Superior Court, supra*, 219 Cal.App.3d at pp. 781-782.) While it is preferable that Judge William Fahey, who is familiar with this case, should preside at trial, if he is unable to do so, in the interest of justice, the case shall be assigned to another department (§ 170.1, subd. (c)) so that the trial can proceed forthwith.

In order to protect plaintiff's substantive right to be present at trial, we conclude the interest of justice requires immediate finality of this case to prevent frustration of the relief granted. Accordingly, the decision is final as to this court when filed. (Cal. Rules of Court, rule 8.264(b)(3).)

Costs of this proceeding are awarded to plaintiff.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.